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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CORNELIUS CHAPMAN SCOTT III, Plaintiff and Appellant, v. GALLATIN MEDICAL CORPORATION, Defendant and Respondent.	B167073 (Los Angeles County Super. Ct. No. BS057068)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alexander Williams III, Judge. Affirmed.

Snipper, Wainer & Markoff and Maurice Wainer for Plaintiff and Appellant.

Harrington, Foxx, Dubrow & Canter, Dale B. Goldfarb and Colleen R. Smith for Defendant and Respondent.

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Cornelius Chapman Scott III, M.D. (Scott) appeals the order denying his motion to set aside a sanction award of $70,650.99 against him in favor of respondent Gallatin Medical Corporation (Gallatin). This appeal represents Scott's second attempt to challenge the trial court's order dismissing his action and awarding sanctions and attorney fees against him. In this appeal, Scott contends that because the trial court lacked jurisdiction to enter the sanction award under rule 227 of the California Rules of Court,[1] the order is void, and may be set aside at any time. We conclude that the sanction award in this case constituted an act merely in excess of jurisdiction by a court having fundamental jurisdiction of the subject matter and parties; it is therefore not subject to collateral attack in the absence of exceptional circumstances precluding an earlier and more appropriate attack. Accordingly, we affirm.

PROCEDURAL BACKGROUND

Scott initiated this action on May 7, 1999 with a complaint alleging causes of action against his former employer, Gallatin, and four individually named defendants. A first amended complaint labeled "First Amended Petition for Arbitration" was filed on or about June 30, 1999. On August 18, 1999 the trial court ordered the case to arbitration based on an arbitration clause contained in the employment agreement.

Numerous discovery disputes and disputes over the arbitration proceedings ensued, prompting Gallatin on December 19, 2000 to move to dismiss the "first amended petition" and request sanctions in the amount of $70,650.99 against Scott and/or his attorney of record, the Law Office of Douglas W. Davis (the "motion to dismiss"). The motion to dismiss was based on alleged misconduct by Scott and his counsel, including refusal to participate in good faith in the arbitration process ordered by the court, failing to respond to discovery, and maintaining an identical lawsuit against the individual defendants in another courthouse for almost a year after those defendants had already

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[1] Hereinafter, rule 227 of the California Rules of Court shall be referenced as "rule 227."

been dismissed from the original case.[2] Gallatin's request for sanctions of $70,650.99 was supported by the declaration of counsel, which stated: "To date, Gallatin has incurred legal fees and costs in the amount of $70,650.99 in defense of the instant action."

At the January 23, 2001 hearing on the motion to dismiss, the trial court described a pattern of gross misconduct and contempt for the court's orders on the part of Scott and his counsel, but expressed doubt regarding its legal authority to award the requested sanctions. Ultimately, however, it granted the motion and awarded attorney fees and sanctions pursuant to rule 227. Scott appealed the order by timely notice of appeal filed February 21, 2001.

In his first appeal,[3] Scott asserted that the trial court lacked jurisdiction to rule on procedural matters or dismiss the action once it had been submitted to arbitration. But the record on appeal, "[l]acking any of the papers filed in the proceedings below, [was] singularly and grossly inadequate," to permit meaningful review, and "Scott's opening brief altogether fail[ed] to 'articulate any pertinent or intelligible legal argument.' (*Berger* [*v. Godden* (1985)] 163 Cal.App.3d [1113,] 1119.)" (*Scott I*, p. 5.) Accordingly, we affirmed the trial court's order, and the remittitur was issued on October 15, 2002.

Thereafter, in November 2002, Scott received a notice of levy against his bank account for the $70,650.99 sanction award. According to Scott, this was the first he learned of the sanctions award; his former attorney had informed Scott of the dismissal, but had never mentioned anything about sanctions. Scott immediately wrote to Davis,

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[2] Scott asserts that he was neither aware of, nor acquiesced in any of this alleged misconduct. To the contrary, he maintains he believed at all times that his attorney, Douglas W. Davis, was handling his case properly, and he was completely unaware of Gallatin's request for sanctions until he received a notice of levy in November 2002.

[3] *Cornelius Chapman Scott v. Gallatin Medical Corporation*, case No. B148183, opinion filed June 26, 2002 ("*Scott I*"). Gallatin's request for judicial notice of the previous appeal, including all briefs, the record on appeal, and this court's unpublished opinion is hereby granted.

demanding an explanation for the sanctions and Davis's failure to inform him about the sanction award. Thereafter, on February 14, 2003 Scott received notice that an earnings withholding order had been served on his employer.

Scott hired new counsel, and filed a motion to set aside the sanctions award on February 21, 2003. In the motion to set aside Scott contended that the trial court lacked jurisdiction to award sanctions under rule 227. He also asserted that Davis, not Scott, committed the misconduct for which sanctions were awarded, and Scott had neither been aware of nor acquiesced in any misconduct in the course of the litigation.

The trial court denied the motion to set aside at a hearing on March 10, 2003, based on its findings that sanctions were properly imposed pursuant to rule 227 and the court's inherent authority, and Scott had personally directed and was responsible for the misconduct of his lawyer in the case. Scott timely appealed on May 5, 2003.

DISCUSSION

A. Standard of Review.

The sole issue presented in this appeal is whether the trial court's order imposing sanctions pursuant to rule 227 and the court's inherent authority was void, and therefore subject to reversal on appeal from the trial court's denial of the motion to set aside the sanction award. (*Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 690-691.) Since these are questions of law, the trial court's order denying the motion to set aside is subject to de novo review.[4] (*City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465, 471-472.)

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[4] Gallatin incorrectly contends the sanction order should be reviewed for abuse of discretion only, citing *20th Century Ins. Co. v. Choong* (2000) 79 Cal.App.4th 1274, 1277, and *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 500. But these cases involved an analysis of whether the conduct of the sanctioned party merited the sanctions awarded, not the trial court's authority to award sanctions in the first instance. The issue in these cases was therefore whether the trial court had abused its discretion in ordering sanctions, whereas the issue presented here involves only the legal question of whether the sanction order was void.

B. Because the Trial Court Exceeded Its Authority in Imposing Sanctions Pursuant to Rule 227, Its Order Was Voidable, Not Void.

Scott contends that under *Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc.* (1997) 60 Cal.App.4th 352, 371, the trial court had no authority to order attorney fees as sanctions based on rule 227, and the order is therefore void. Although we agree that the trial court exceeded its jurisdiction in awarding attorney fees as sanctions under rule 227, we reject Scott's conclusion that the order is void.

"A judgment is void if the court rendering it lacked subject matter jurisdiction or jurisdiction over the parties." (*Carlson v. Eassa, supra,* 54 Cal.App.4th at p. 691.) "The principle of 'subject matter jurisdiction' relates to the inherent authority of the court involved to deal with the case or matter before it. (See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) In contrast, a court acts in excess of jurisdiction '"'"where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites."' [Citations.]" (*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1087-1088.) "'Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis,* are in excess of jurisdiction . . . .' [Citations.]" (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 598-599.)

"Action 'in excess of jurisdiction' by a court that has jurisdiction in the 'fundamental sense' (i.e., jurisdiction over the subject matter and the parties) is not void, *but only voidable.* [Citations.] In contrast to cases involving other types of jurisdictional defects, a party may be precluded from challenging action in excess of a court's jurisdiction when the circumstances warrant applying principles of estoppel, disfavor of collateral attack or res judicata." (*Conservatorship of O'Connor, supra,* 48 Cal.App.4th at p. 1088.)

The "estoppel" principle is particularly compelling where, as here, what is involved is a collateral attack that could have been avoided by simply raising the issue in the first appeal. In this regard, we observe that the sanction issue was before us in the prior appeal, but Scott *abandoned* it by failing to "'articulate any pertinent or intelligible legal argument'" with reference to the sanction award. (*Berger v. Godden, supra,* 163 Cal.App.3d at p. 1119.)[5] In such a situation the following rule should be applied: "'If there is jurisdiction of the subject matter and the parties, one who complains of the act is usually before the court. He has an opportunity to object, or to have the judgment or order reviewed by the usual methods of direct attack, such as new trial or appeal. He may also in many situations use the extraordinary writs of prohibition, mandamus or certiorari to directly attack and prevent or annul the unauthorized act. In brief, there are adequate methods of direct attack on such judgments, and there is almost a presumption of negligence on the part of the aggrieved party who fails to seek these normal remedies and later raises the objection by collateral attack. [¶] If this analysis is sound, acts merely in excess of jurisdiction, by a court having jurisdiction of the subject matter and parties, should not be subject to collateral attack unless exceptional circumstances precluded an earlier and more appropriate attack.'" (*Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 Cal.App.4th 1011, 1024, quoting what is now 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 323, p. 899.)

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[5] Specifically, we noted in *Scott I* that "[t]he opening brief also does not contain a single citation to legal authority relating to Scott's contention that the trial court erroneously awarded sanctions against Scott and his counsel. (*Berger v. Godden* [, *supra*,] 163 Cal.App.3d [at p.] 1117; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) . . . . [Citation.] [¶] 'This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record.' (*MST Farms v. C. G. 1464* (1988) 204 Cal.App.3d 304, 306.) 'When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary. [Citations.]' (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)"

C. The Sanction Award Is Not Subject to Collateral Attack Because There Were No Exceptional Circumstances to Preclude an Attack on the Sanction Order in the First Appeal.

"[E]ven were we to assume that the defect in the . . . judgment was jurisdictional, nevertheless, in the absence of unusual circumstances 'collateral attack will not be allowed where there is fundamental jurisdiction (i.e. of the person and subject matter) *even though the judgment is contrary to statute*.' (*Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 727.)" (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 951, italics added.) As noted above, the sanction issue was before the court in the prior appeal, but was abandoned. Abandonment of a viable issue on appeal clearly does not constitute exceptional or unusual circumstances precluding attack on the voidable sanctions order in *Scott I*.

Nor does Scott's alleged ignorance of the sanction award justify collateral attack on the trial court's order. A client is presumed to have voluntarily chosen his attorney as his representative agent, and the agent's knowledge is imputed to the principal even where the agent does not actually communicate with the principal, who thus lacks actual knowledge of the imputed fact. (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 828; *Link v. Wabash R. Co*. (1962) 370 U.S. 626, 633-634.) "'. . . This constructive notice, when it exists, is irrebutable. . . .' [Citation.]" (*Powell v. Goldsmith* (1984) 152 Cal.App.3d 746, 751.) The client "is considered to have 'notice of all facts, notice of which can be charged upon the attorney,' [citation]" and thus cannot avoid the consequences of the acts or omissions of his freely selected agent on the basis of alleged ignorance of counsel's unexcused conduct. (*Link v. Wabash R. Co., supra,* 370 U.S. at pp. 633-634; see also *Garamendi v. Golden Eagle Ins. Co*. (2004) 116 Cal.App.4th 694, 711-712.) "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice," but he may not escape the obligations imposed by the court based on his attorney's actions. (*Link v. Wabash R. Co.,*

supra, 370 U.S. at p. 634, fn. 10; see also *Garamendi v. Golden Eagle Ins. Co., supra*, 116 Cal.App.4th at p. 712, fn. 9.)

DISPOSITION

The order denying the motion to set aside the sanction award is affirmed. Respondent's motion for sanctions is denied. The parties are ordered to bear their own costs of appeal.

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_____, J.

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We concur:

_____, P. J.

BOREN

_____, J.

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